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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter	)	
	)	
Rules and Policies on Foreign	)	IB Docket No. 97-142
Participation in the U.S.	)	
Telecommunications Market	)	

COMMENTS OF DEUTSCHE TELEKOM AG AND DEUTSCHE TELEKOM, INC.

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SUMMARY

Deutsche Telekom AG and Deutsche Telekom, Inc. [collectively "DT"] support the FCC's proposal to adopt a more open entry policy for foreign participation in the U.S. international telecommunications market, including abolition of the so-called effective competitive opportunities ("ECO") test. However, the FCC's proposals to adopt new entry restrictions and safeguards for foreign carriers under the "public interest" rubric are contrary to the General Agreement on Trade in Services ("GATS") pursuant to the WTO Basic Telecom Agreement ("WTO Agreement") and wholly unnecessary to promote competitive conditions in the U.S. market.

Most European Union member countries and other major trading partners of the United States plan to implement the WTO Agreement without reserving the right to deny entry to any foreign carrier and without imposing dominant carrier safeguards upon carriers with foreign market power. DT urges the FCC to join with Germany and other countries in sweeping away foreign carrier regulations, as required by the GATS framework. The United States should not relinquish the leadership role it exercised in facilitating the WTO Agreement through proposed policies that depart from the GATS requirements of unrestricted and nondiscriminatory entry opportunities for all carriers in all countries.

The FCC will not lose the ability to promote the U.S. "public interest" by implementing the GATS requirements under the WTO Agreement. All countries will be able to promote the "public interest" through reasonable post-entry laws and regulations that apply to all carriers on a nondiscriminatory basis.

There are numerous inconsistencies between the FCC's proposed policies and the GATS framework. By proposing policies which openly discriminate among foreign carriers, the FCC would violate the Most Favoured Nation requirement in GATS Article II.

The FCC's apparent intention to treat U.S.-owned carriers more leniently than foreign carriers contradicts the National Treatment requirement in GATS Article XVI, and the subjective, vague "public interest" test ignores the requirement in GATS Article VI for "reasonable, objective and impartial" regulations. The FCC's proposed reservation of a right to exclude foreign carrier entry for competitive or other reasons is a patent violation of the Market Access principle in GATS Article XVII. DT is particularly surprised that the FCC has reserved the right to deny entry into the U.S. market based upon trade policy, foreign policy and other political factors. If all countries were to adopt these restrictive, discriminatory and non-transparent policies, the pro-competitive results of the WTO Agreement would be compromised.

DT also opposes the FCC's proposal to reserve the right to deny foreign carriers the ability to obtain 100% indirect ownership of Title III licenses, and to deny foreign carriers access to cable landing licenses in the United States, as being contrary to fundamental GATS principles. Similarly, the FCC's proposed rules for processing Section 214 applications by foreign carriers or their affiliates are plainly contrary to the National Treatment and Most Favoured Nation requirements.

The FCC's contention that the WTO Reference Paper authorizes these departures from the GATS framework is specious. The WTO Reference Paper is an Additional Commitment which cannot modify the Most Favoured Nation requirement, and the purpose of Additional Commitments is to facilitate, not impede, full implementation of the Market Access and National Treatment principles. Further, it is inappropriate for any country to adopt entry restrictions or other dominant carrier safeguards based upon a carrier's alleged foreign market power. Under the WTO regime, it is the responsibility of the foreign country to regulate carriers in its own market, and the United States must

undertake WTO consultations or dispute resolution if it believes that a foreign country is derelict in its responsibilities under the WTO Agreement. Certainly, the United States would be concerned were a foreign country to reserve the right to deny entry to U.S. carriers, or to impede their entry opportunities through dominant carrier regulations, based upon their perceived market power in the United States.

Further, the FCC's proposed entry and safeguard policies for foreign carriers are an example of excessive regulation which will impede competitive entry into the U.S. market. The FCC concludes that the WTO Agreement itself largely will eliminate the possibility that foreign market power could be leveraged into the U.S. market, and the FCC is poised to adopt new settlement rate policies as an insurance policy against such conduct. Without withdrawing its opposition to the unilateral nature of the FCC's settlement rate proposals, DT would point out that the FCC's proposal to impose two more layers of regulation on foreign carriers through basic and supplemental safeguards would appear to be wholly gratuitous for carriers from WTO member countries who have negotiated settlement rates on the U.S. route that fall within the FCC's proposed benchmark range. The FCC should not impose dominant carrier safeguards upon any foreign carrier whose settlement rate complies with the FCC's benchmark policies.

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Washington, D.C.

In the Matter of	)	
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Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142

TO: The Commission

COMMENTS OF DEUTSCHE TELEKOM AG AND DEUTSCHE TELEKOM, INC.

Deutsche Telekom AG and Deutsche Telekom, Inc. [collectively "DT"] hereby submit these comments in response to the Order and Notice of Proposed Rulemaking (FCC 97-195) [hereinafter "Notice"] released by the FCC in the above-captioned proceeding on June 4, 1997. The Notice begins a rulemaking to review the FCC's policies regarding foreign investment and entry in the U.S. international telecommunications market, including the effective competitive opportunities ("ECO") policy, in light of the World Trade Organization ("WTO") Basic Telecom Agreement that goes into effect on January 1, 1998.

DT endorses the FCC's proposal to repeal the ECO policy, and its expressed desire to apply a more open entry policy for foreign carriers. Further, DT applauds the FCC's stated desire not to impede foreign carriers' opportunity to participate in the U.S. international telecommunications market through prolonged inquiries into competitive conditions in foreign countries or "the effectiveness of foreign regulation in the destination

market." Id. at ¶¶ 5 & 87. DT believes that those changes are a good first step on the road to full implementation of the WTO Basic Telecom Agreement.

At the same time, DT strongly opposes the FCC's proposals to adopt new entry restrictions and safeguards for foreign carriers under the "public interest" rubric. Those proposals are both contrary to the foundation principles of the WTO Basic Telecom Agreement and overly cautious from the perspective of preventing anti-competitive practices in the U.S. market. Most European Union member countries and numerous other trading partners of the United States plan to implement the WTO Basic Telecom Agreement without denying entry to any U.S. or foreign carrier, and without the safeguards that the FCC proposes to impose upon foreign carriers who seek to participate in the U.S. market. Germany will allow U.S. and other foreign carriers to enter the German market without examining such carriers' foreign market power or considering political factors such as trade policy. Nor will Germany impose dominant carrier safeguards to address the theoretical possibility of anti-competitive actions by new entrants with foreign market power.

The FCC's proposals are contrary to the GATS requirements of unrestricted and nondiscriminatory entry opportunities for all carriers in all countries. The United States should not willingly relinquish the leadership role it has exercised in facilitating the agreement of 69 countries to the WTO Basic Telecom Agreement by adopting its proposed policies. The example the FCC proposes to set in this rulemaking proceeding not only would impede competitive opportunities in the U.S. market for foreign carriers, it could encourage other countries to restrict U.S. and other foreign carriers from entering their markets or to impose onerous regulations upon those carriers both before and after entry.

The unrestricted open entry policy required by the WTO Basic Telecom Agreement does not compromise in any way the FCC's ability to take actions necessary to

promote the U.S. public interest. The United States, Germany and all other signatories will be capable of promoting fully the public interest through post-entry laws and policies that apply in a reasonable and non-discriminatory fashion to all carriers. What the Agreement does prohibit is the use of foreign carrier entry restrictions, or regulations that discriminate among or against foreign carriers, as mechanisms to implement Government policy. The cornerstone of the WTO Basic Telecom Agreement is the consensus judgment that it is not in the "public interest" of any country to deny entry to, or to impose special regulations upon, foreign carriers.

The GATS principles do not permit any country to apply the broad "public interest" test that the FCC has proposed in this proceeding. GATS Article XIV establishes limited General Exceptions so that the United States and other countries can preserve overriding public interest objectives. However, those General Exceptions are far narrower than the FCC's proposed "public interest" test, and they do not authorize discrimination among or against foreign carriers under any circumstances. To the extent the United States desires more expansive "public interest" authority, there are WTO mechanisms in Article XIV that the United States must invoke to do so. Therefore, because the United States Government did not write any "public interest" limitations into its Schedule of Specific Commitments, the FCC may not adopt or implement its proposed "public interest" test in compliance with GATS principles.

The FCC incorrectly assumes throughout the Notice that it will retain in the post-WTO environment the discretion it has today to deny or condition foreign carrier entry to promote what it regards to be the U.S. "public interest." DT particularly objects to the FCC's apparent plan to preserve various aspects of the ECO standard as part of its broad "public interest" test. The WTO Basic Telecom Agreement is an international treaty that is

legally binding upon the United States; the FCC has no more right to modify or set aside GATS principles to implement the ECO standard, the "public interest" test, or other policies than it does to modify or set aside the requirements of the Communications Act of 1934.[1]

The FCC's proposals for implementing the WTO Basic Telecom Agreement are a textbook example of excessive regulation which will impede competitive entry in the U.S. market. The FCC concludes that the WTO Basic Telecom Agreement itself largely will eliminate the possibility that foreign market power could undermine competitive conditions in the United States, and the FCC is poised to adopt new settlement rate policies as an insurance policy against anticompetitive conduct by foreign carriers to the detriment of U.S. consumers. For the FCC to propose still more layers of regulation through entry tests and special safeguards applicable solely to foreign carriers is not only wholly unnecessary, it would defeat the fundamental purpose of the WTO Basic Telecom Agreement to obviate intrusive national regulation by fostering open markets and competitive entry. The FCC should embrace rather than resist the pro-competitive market structure changes that the WTO Basic Telecom Agreement will introduce in the United States, Germany and other signatory countries.

To the extent the FCC decides to retain some level of entry restrictions and regulatory safeguards for foreign carriers, DT requests that the FCC establish policies with objective and transparent criteria to create the regulatory certainty necessary to promote cross-border investment and entry in telecommunications services. The proposed policies are inherently uncertain in their meaning and application. What are the FCC's criteria for

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[1] E.g., MCI Telecommunications Corp. v. AT&T Corp., 512 U.S. 218 (1994) (FCC did not have authority to remove statutory tariffing requirement without authorization from Congress).

measuring a foreign carrier's market power? Which foreign carriers have market power? Which foreign carriers will be subject to "basic" conditions, and which will be subject to "supplemental" conditions? Will the FCC take trade and other political concerns into account in applying its "public interest" policies? What level of investment by a foreign carrier in a U.S. carrier will trigger the FCC's "public interest" scrutiny? The answers to these and other, similar questions must be known in advance if the FCC desires to create the environment necessary for market-driven investment and entry among global telecommunications markets.

I. THE FCC SHOULD ADOPT AN UNRESTRICTED OPEN ENTRY POLICY

For WTO member countries, the FCC proposes to rescind the ECO policy that has regulated foreign carrier entry into the U.S. international telecommunications market over the past several years. Notice at ¶¶ 10 & 29. In place of the ECO policy, the Notice (at ¶ 32) proposes to establish a "rebuttable presumption" in favor of granting a Section 214 application by a carrier from a WTO member country. In order to overcome that presumption, a party normally would have to show that granting the application would pose a "very high risk" to competition in the United States that could not be addressed through safeguards. Id. The FCC stated that it would deny an application if it found that entry might harm U.S. consumers, including applications from carriers who are affiliated with "multiple foreign carriers that control bottleneck facilities on the foreign end of major international traffic routes." Id. at ¶¶ 39-40. The FCC also stated that it likely would deny an application in cases where the foreign carrier has "extensive facilities, including scarce orbital locations and spectrum, a large foreign customer base, extensive proprietary network

information, and insufficient separation from, or close ties to, foreign government entities." Id. at ¶ 40. The FCC further asserted that it would deny a foreign carrier's Section 214 application to enter the U.S. market for various other reasons, including "foreign policy or trade concerns brought to our attention by the Executive Branch." Id. at ¶ 43.

A. WTO Implementation By Other Countries.

Most European Union member countries and numerous other trading partners of the United States will implement the WTO Basic Telecom Agreement, as they agreed, without restricting entry by U.S. or other foreign carriers. These countries will not examine whether the entrant's foreign parent has market power in other countries, nor will they allow political influences to affect the entry opportunities of foreign carriers. In Germany, U.S. and other foreign carriers will be permitted to enter the market without being required to run the gauntlet of a "public interest" test or having their entry impeded by political factors such as trade policy. This type of unrestricted open entry policy is not only what the WTO Basic Telecom Agreement expressly requires, it is the policy that will best promote competition in telecommunications service markets. DT is confident that every country will be able to establish reasonable and non-discriminatory post-entry laws and regulations applicable to all carriers will be sufficient to deter and punish anti-competitive or otherwise unlawful conduct. Therefore, DT urges the FCC to join with Germany and other progressive countries by adopting an unrestricted open entry policy to implement the WTO Basic Telecom Agreement.

B. GATS Principles.

In the following sections, DT shows that the entry regulations proposed by the FCC under the "public interest" rubric do not comply with fundamental GATS principles.[2] The FCC should adopt an unrestricted open entry policy as required by the GATS principles and the WTO Basic Telecom Agreement, and the FCC should confirm that it will apply that policy not only to Section 214 applications by foreign carriers or their affiliates, but to applications to transfer control of an authorized U.S. carrier to a foreign carrier or its affiliate.

(i) Market Access.

GATS Article XVI requires the United States Government to allow foreign carriers to enter U.S. telecommunications markets as provided for in its Schedule of Specific Commitments. The assorted "public interest" reasons listed by the FCC in the Notice are not on that Schedule and, therefore, they cannot justify excluding foreign carriers from the U.S. market. The United States Government should not renege upon its nearly unqualified subscription to Market Access in the WTO Basic Telecom Agreement through post hoc entry barriers erected by the FCC pursuant to the "public interest" rubric.[3] Creating a "rebuttable

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[2] The Notice recognizes the GATS principles but nowhere addresses whether the FCC's proposed policies are consistent with the GATS framework under the WTO Basic Telecom Agreement. While DT presumes that the FCC regards its proposals to be consistent with the GATS framework, the absence of any FCC analysis on that point is a troubling omission from the Notice.

[3] This is not a case where a country has established objective and transparent financial, technical or other criteria which must be satisfied by any carrier, foreign or domestic, before entry is permitted. The FCC for years has permitted carriers to enter the U.S. international telecommunications market without meeting such criteria. Any criteria the FCC adopts in this proceeding would be directed primarily if not exclusively at foreign carriers.

presumption" that foreign carriers should be permitted to enter the U.S. market does not comply with the Market Access commitment.

Although the FCC expresses concern about the ability of carriers to leverage foreign market power into the U.S. international telecommunications market, the WTO Basic Telecom Agreement does not permit the FCC to exclude carriers with foreign market power from the U.S. market. It was understood by the United States and all other signatories that many international carriers have market power in their home markets today. Indeed, it was precisely because numerous carriers retained monopoly national market positions that the United States, Germany and other countries offered such strong support for the Agreement. The purpose of the Agreement was to permit all foreign carriers, whether or not they have market power, to enter each other's markets freely. It is doubtful that 68 other countries would have signed the Agreement if the FCC had expressly reserved the right to exclude carriers with foreign market power from the U.S. market. The United States did not reserve the right in its Schedule of Specific Commitments to exclude carriers with foreign market power from the U.S. market,[4] and it may not do so without violating the Market Access principle.[5]

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[4] See GATS Article XX (a member country must specify any "terms, limitations and conditions on market access" in its Schedule of Specific Commitments).

[5] DT also would note that the FCC apparently proposes to apply a different regulatory regime for so-called non-equity business arrangements between U.S. and foreign carriers. In particular, the FCC does not reserve the right to prohibit such arrangements under the "public interest" rubric, although it does assert the discretion to impose basic or supplemental safeguards. Notice at ¶ 86. DT believes that the FCC should adopt a consistent open entry policy for equity and non-equity participation strategies.

(ii) Most Favoured Nation

GATS Article II requires the United States to treat the carriers of one country no less favorably than it treats "like" carriers of any other country. The United States must comply with the MFN obligation "immediately and unconditionally." It is difficult to imagine a more patent violation of the MFN principle than the FCC's reservation of authority to exclude carriers from certain countries from entering the U.S. market, while permitting carriers from other countries to enter the U.S. market. The WTO Basic Telecom Agreement does not permit the United States or any other country to choose which foreign carriers will be permitted to enter its telecommunications market. The Market Access principle requires the United States Government to permit all foreign carriers to enter the U.S. market, and the MFN principle underscores that principle by negating the FCC's ability to pick and choose the foreign carriers who will be permitted to enter the U.S. market.

The FCC's proposal cannot be squared with the MFN principle on the theory that foreign carriers with market power are not "like" other foreign carriers. The FCC does not propose to exclude all foreign carriers with market power from the U.S. market, and it proposes to take numerous factors into account other than market power. Therefore, the FCC cannot seek to justify its proposed policies as measures designed to prevent the abuse of foreign market power. What the FCC has effectively proposed is to reserve for itself the discretion to discriminate among foreign carriers regarding entry into the U.S. international telecommunications market based upon ad hoc "public interest" reasons in violation of the WTO Agreement.

(iii) National Treatment.

GATS Article XVII requires the United States to treat foreign carriers no less favorably than it treats "like" U.S. carriers. The Notice is silent as to whether the FCC plans to impose entry restrictions upon U.S. carriers with an ownership interest in the carrier at the foreign end of the route, or what standards the FCC would use in applying such restrictions. The FCC's statement that it would impose sanctions for anti-competitive conduct equally upon U.S.- and foreign-owned carriers (Notice at ¶ 81 n.73) does not address the entry question. Assuming that the FCC does not plan to adopt entry restrictions for U.S. carriers who have an ownership interest in foreign carriers, the National Treatment principle compels the FCC to adopt an unqualified open entry policy for foreign carriers in the U.S. market. Section 3 of GATS Article XVII confirms that the purpose of the National Treatment obligation in the context of the WTO Basic Telecom Agreement is to prevent a country from placing foreign carriers at a competitive disadvantage in its telecommunications market.[6] It is difficult to imagine a more significant competitive disadvantage for a foreign carrier than being excluded from a country's market on one or more routes. The FCC's proposal to establish foreign carrier entry restrictions under the "public interest" rubric is inherently contrary to the National Treatment principle.

Moreover, even if the FCC clarified that it was reserving the right to impose entry restrictions upon U.S. carriers with an ownership interest in foreign carriers with market power, such a clarification would not make entry restrictions on foreign carriers or their affiliates compatible with the National Treatment principle. At a minimum, the FCC

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[6] Section 3 provides that "[f]ormally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

would have to impose entry restrictions upon all dominant U.S. carriers who obtain an ownership interest in foreign carriers, regardless whether such carriers have market power at the foreign end. Indeed, if the FCC is truly concerned about the exercise of market power, it should be prepared to exclude dominant U.S. carriers from the international market even when they have no foreign affiliations. Rather than seek to ensure compliance with the National Treatment principle by expanding the universe of carriers who could be denied entry to include some U.S.-owned carriers, DT submits that the most natural and pro-competitive way to comply with the National Treatment principle would be to adopt an unqualified open entry policy for all carriers.[7]

(iv) Domestic Regulation.

GATS Article VI requires the United States Government to administer all measures of general application in a "reasonable, objective and impartial manner." The policies proposed in the Notice do not satisfy those requirements. In particular, the FCC's "public interest" standard for reviewing Section 214 applications by foreign carriers is inherently subjective; that standard neither provides guidance to foreign carriers regarding their entry prospects nor imposes any discernible limitation upon the FCC's discretion to pick and choose the foreign carriers it will permit to enter the U.S. market. The FCC does not provide objective content to its standard regarding a "very high risk" of anticompetitive conduct. Further, the FCC does not specify how it will take into account the likelihood of such conduct versus the potential quantum of impact in assessing the nature of the alleged

[7] In any event, DT submits that it would be impossible for the FCC to devise regulations that ensure nondiscriminatory treatment between U.S.-owned and foreign-owned carriers as required by the National Treatment principle if the FCC retains the discretion to exclude foreign carriers on trade, foreign policy, or other political grounds.

risk of harmful activities, nor does it identify the factors it will use to assess foreign market power or its methodology for evaluating the potential impact on the United States.[8]

Further, the FCC's proposed policies are not "reasonable" or "impartial." The FCC's plan to take into account extraneous factors such as trade and foreign policy concerns creates the possibility that political factors will motivate the FCC's decision whether to permit foreign carriers to enter the U.S. market. The only way the FCC can comply fully with the GATS requirement for "reasonable, objective and impartial" domestic regulations is to adopt an unqualified open entry policy for foreign carriers and promote the U.S. public interest through post-entry laws and regulations that apply in a reasonable and non-discriminatory fashion to all carriers.

Further, Section 4 of GATS Article VI provides that the Council for Trade in Services shall develop any necessary disciplines to make sure that "licensing requirements do not constitute unnecessary barriers to trade in services." That provision states that any such licensing factors must be "based on objective and transparent criteria, such as competence and ability to supply the service" or designed to ensure an acceptable "quality of service." Licensing requirements based upon foreign market power or the other factors identified by the FCC in the Notice do not qualify under these standards and, therefore, such requirements are prohibited.[9] Under Section 5(a), that prohibition governs the United States and other

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[8] For similar reasons, DT submits that the FCC's proposed policies do not satisfy the Transparency requirement in GATS Article III to publish "all relevant measures of general application which pertain to or affect the operation of this Agreement."

[9] In DT's view, licensing requirements such as foreign market power or political factors plainly do not qualify, unlike fundamental qualifications such as "competence" and "ability to supply the service," as objective and transparent criteria.

countries even before the Council for Trade in Services has developed additional disciplines.[10] Therefore, DT submits that the FCC's proposed "public interest" test is contrary to GATS Article VI.

C. The WTO Reference Paper.

The FCC contends that the WTO Reference Paper authorizes it to enforce entry restrictions to prevent anti-competitive practices. Notice at ¶¶ 9, 79. Initially, it should be noted that under this interpretation, the Reference Paper would authorize the FCC to restrict entry only to prevent anti-competitive practices, but it would not further authorize the FCC to restrict entry based upon factors such as national security, law enforcement, trade policy, foreign policy, or actionable misconduct under U.S. laws and policies. Therefore, the FCC's interpretation of the Reference Paper implicitly repudiates most of the myriad grounds set forth in the Notice for possible denial of Section 214 applications filed by foreign carriers.

Further, the FCC cannot invoke the WTO Reference Paper to reconcile the proposed "public interest" entry test with the MFN principle. Under GATS Article XVIII, Additional Commitments relate solely to Market Access under Article XVI and National Treatment under Article XVII. Additional Commitments do not affect a country's obligation to comply with the MFN principle under Article II.

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[10] Given the leadership role played by the United States in negotiating a WTO Agreement with a minimum of limitations and modifications, the unconditional nature of the Market Access commitments made by the United States in subscribing to the WTO Agreement, and the failure of the United States during the negotiations to inform other countries that it planned to restrict entry based upon a "public interest" test, DT submits that the FCC's proposals do not qualify under Section 5(a)(ii) as measures which could "reasonably have been expected of that Member at the time the specific commitments in those sectors were made."

Moreover, the FCC's contention that the Reference Paper authorizes it to deny entry on competitive grounds is specious. The Reference Paper is stated to be an Additional Commitment of the United States, not an implicit limitation on the commitments of the United States Government regarding Market Access or National Treatment.[11] Pursuant to GATS Article XVIII, Additional Commitments are intended to facilitate, not impede, the effective implementation of the Agreement.

Further, the Reference Paper does not authorize the FCC to adopt policies based upon the perceived market power of carriers in other countries. The definition of a "major supplier" as a carrier with "control over essential facilities" or a dominant "position in the market" refers to a carrier's facilities and position in the market of the Government who is implementing the Reference Paper. The United States Government may adopt reasonable and non-discriminatory post-entry measures to prevent anti-competitive conduct by carriers who control essential United States facilities or who have a dominant position in the United States market.[12] However, in cases where a foreign carrier has market power in a foreign country, it is the sole responsibility of the foreign Government to adopt and enforce appropriate measures to prevent the abuse of such market power. Simply put, the WTO Basic Telecom Agreement does not permit the United States Government to exclude foreign

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[11] The Reference Paper permits only "appropriate" measures to prevent anti-competitive conduct. Excluding foreign carriers from entering the U.S. market is an inherently inappropriate measure for controlling the perceived risk of anti-competitive conduct. The FCC has presented no empirical or other reasons to believe that reasonable and non-discriminatory post-entry regulations could not control such misconduct, and we have shown above that excluding carriers from the market would undermine both the letter and spirit of the WTO Basic Telecom Agreement.

[12] Of course, such measures must not discriminate between U.S. and foreign carriers under the National Treatment principle in GATS Article XVII.

carriers from entering the U.S. market due to market power they allegedly possess in a foreign country.

The GATS principles make clear that a member country may not adopt entry restrictions or foreign carrier safeguards to prevent the leveraging of foreign market power. GATS Article VIII affirms that each country is responsible for ensuring that its monopoly suppliers act consistently with the country's GATS obligations. Further, GATS Article IX requires member countries to engage in consultations regarding business practices of service suppliers that restrict trade in services. Therefore, if the United States believes that a foreign carrier is leveraging foreign market power into the U.S. market, the appropriate course of action is for the United States to institute consultations with the foreign country or, if the United States believes that a GATS violation has occurred, to invoke WTO dispute resolution procedures.

Adopting an open entry policy as required by the WTO Basic Telecom Agreement will not prevent the FCC from protecting the U.S. public interest. Certainly, Germany and the other major trading partners of the United States who are adopting an unqualified open entry policy do not believe that they are compromising their ability to promote important national policy goals. An open entry policy does not prevent the United States from protecting the public interest adequately through legislation, as well as reasonable and non-discriminatory post-entry FCC regulations.[13] DT cannot conceive of any case, nor does the Notice posit one, where excluding a foreign carrier from the U.S. market is necessary to address the perceived danger of anti-competitive or other harmful conduct.

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[13] No Section 214 conditions that apply, or are designed to apply, primarily to foreign carriers can qualify as legitimate post-entry regulations within the GATS framework.

Moreover, the GATS framework plainly prohibits a broad "public interest" power such as the FCC has proposed. GATS Article XIV (General Exceptions) states that countries retain discretion to promote specified, narrowly-defined public interest objectives of overriding importance (e.g., public morals and public order) so long as they do so in a non-discriminatory manner. Article XIV does not authorize, and therefore implicitly prohibits, actions by member countries to exclude foreign carriers based upon perceived foreign market power or political factors such as trade policy. The "public interest" standard proposed by the FCC is far broader than the narrowly-defined public policy exceptions under GATS Article XIV.

The FCC's interpretation of the WTO Reference Paper is not only contrary to fundamental GATS principles, it might encourage other countries to violate the WTO Agreement through entry restrictions upon foreign carriers. Other countries could adopt even broader policies to exclude foreign carriers -- including U.S. carriers -- for the alleged purpose of preventing anti-competitive or other harmful activities. Further, countries might seize upon the universal service provisions in the Reference Paper to justify widescale limitations on investment or entry by foreign carriers in their countries. To avoid opening this Pandora's box, the FCC should not admit that any circumstances exist, other than those listed in a country's Schedule of Specific Commitments, in which it would be consistent with the WTO Basic Telecom Agreement for a country to exclude foreign carriers from entering its telecommunications market.

D. Trade and Other Extraneous Factors.

As noted above, the Notice (at ¶ 43) proposes that the FCC would have the discretion to exclude a foreign carrier from the U.S. market based upon trade policy or other

extraneous factors. If the WTO Basic Telecom Agreement stands for anything, it is that a WTO member country cannot exclude a foreign carrier from its telecommunications markets for trade or similar political reasons. To the extent the United States had trade policies that it wishes to implement regarding telecommunications markets, it was incumbent upon the United States to persuade other countries to accept those policies in the WTO Agreement, to reserve its right to implement those policies in its Schedule of Specific Commitments, or to abandon those policies pursuant to the give-and-take that resulted in the WTO Agreement. There is no lawful fourth option that permits the United States to violate GATS principles through the post hoc enforcement of trade or similar political policies.

DT's concern that FCC decisions on foreign entry into the U.S. market could be motivated by trade or similar political factors is not speculative. In the past the FCC has withheld acting upon the Section 214 applications of foreign-affiliated carriers based upon unrelated trade disputes at the direction of the Office of the United States Trade Representative ("USTR") and other U.S. Government bodies.[14] In its Schedule of Specific Commitments, the United States Government did not reserve the right to exclude foreign carriers from the U.S. market for political or trade reasons. The FCC should clarify that it will never again deny or delay a Section 214 application by a foreign-affiliated U.S. carrier as an instrument of U.S. Government bodies to promote the trade or political agenda of the United States.

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[14] E.g., Letter from D. Abelson, USTR, to R. Porter, FCC (Oct. 31, 1996) (instructing the FCC to delay processing Section 214 applications filed by TLD due to "trade policy concerns"); Letter from L. Irving, NTIA, J. Lang, USTR & V. McCann, Department of State, to R. Hundt, FCC (March 7, 1997) (instructing the FCC to delay processing Section 214 applications filed by KDD America and NTTA Communications, Inc. due to "trade policy concerns").

Similarly, DT objects to the FCC's reservation of a right to exclude a foreign carrier from the U.S. market for engaging in actionable misconduct under U.S. laws and policies. Notice at ¶ 41. That reservation is contrary to the letter and spirit of the WTO Basic Telecom Agreement. The United States may adequately vindicate the public interest through the normal enforcement of its civil and criminal laws. Historically, the FCC has rarely asserted the need for authority to banish U.S.-owned carriers from the U.S. telecommunications market as a punishment for misconduct. It would violate both the National Treatment and Market Access principles for the FCC to discriminate against and among foreign carriers in exercising such authority.

DT also objects to the FCC's statement that it may deny entry to foreign carriers based upon "national security," "law enforcement" or "foreign policy" grounds. Notice at ¶ 43. The United States Government did not reserve any such authority in its Schedule of Specific Commitments, and it may not create such modifications after the fact. With respect to national security, GATS Article XIV *bis* (Security Exceptions) establishes a narrowly-defined exception whereby countries may act to protect legitimate national security interests. However, the FCC's proposal to take "national security" interests into account is, on its face, far broader than what GATS Article XIV authorizes. Further, it is difficult to conceive of how a foreign carrier's mere entry into the U.S. international telecommunications market could jeopardize legitimate national security, law enforcement or foreign policy interests of the United States Government. In every case such interests can be preserved adequately through non-discriminatory measures that do not require excluding a foreign carrier from the U.S. marketplace.

E. The ECO Policy.

DT strongly supports the FCC's proposal to rescind the ECO policy for WTO member countries.[15] The FCC held that the WTO Basic Telecom Agreement removes the need for the ECO policy because "the Agreement will substantially open foreign markets and will greatly reduce foreign carriers' ability to engage in anticompetitive conduct in the provision of U.S. international services and facilities." Notice at ¶ 29. While DT agrees that there is no need for the ECO policy, DT believes that rescinding the ECO policy is required on even more fundamental grounds. As an entry restriction that discriminates among foreign carriers, the ECO policy is inconsistent with the GATS principles of Market Access and MFN. The FCC should rescind the policy not merely because there is no need for it, but also because the WTO Basic Telecom Agreement prohibits it.

Further, DT submits that the FCC's rationale for rescinding the ECO policy is a thread that unravels the FCC's proposed "public interest" standard for regulating foreign carrier entry into the U.S. market. If there is no need for an ECO policy because the WTO Basic Telecom Agreement will promote competition and effective regulation in foreign countries, then there is no need for any restrictions on foreign carrier entry into the U.S. market. The FCC can adequately address anti-competitive activities through reasonable and non-discriminatory post-entry regulations and policies. The FCC's concern that certain WTO member countries might not fully implement the agreement (Notice at ¶ 14) cannot justify unilateral FCC action in violation of GATS principles.[16] The WTO dispute resolution

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[15] DT takes no position on the FCC's proposal to retain the ECO policy for non-member countries.

[16] Similarly, the FCC's concern that certain countries made "no or limited" WTO commitments (Notice at ¶ 15) cannot justify self-help remedies by the FCC. The U.S. and (continued...)